Free Speech Union
of Australia

By email only: OSAReview@COMMUNICATIONS.gov.au

15 June 2024

Dear Ms Rickard,

Consultation Response for the Review of the Online Safety Act 2021 (Cth)

The Free Speech Union of Australia (FSU) is a non-profit organisation that aims to protect and promote the free speech rights of our members and Australians more broadly.

We write to provide our submissions to your review on the Online Safety Act 2021 (Cth). Our position is that the existing regime should be abolished, given the serious problems that this office has caused. There are better models for addressing online harms rather than a single Commissioner, let alone one who takes the partisan and ideological approach of Ms Inman Grant. Her office has succeeded into bringing into disrepute an important concern. She has also attacked the democratic rights of Australians. **We have obtained over 15,000 signatures on a petition to abolish her office**.

The fundamental issue is that concerns such as 'hate speech', 'harm' and 'misinformation' are inherently subjective. Even with the best intentions, attempts to prevent them with censorship inevitably end up harming the interests of minorities and undermining fundamental rights.[1]

We consider that any genuine issues could be considered through a 'privacy and data protection' model, which would resolve the serious issues with the current Commissioner. In respect of preventing harmful content, tools are now available 'on device', so there is no need to provide 'age verification' and other tools. We explain our views in more detail below.

1. **The Privacy and Data Protection Model**

[1] For an account of this concern with respect to Hate Speech, consider Strossen, Nadine. *Hate: Why we should resist it with free speech, not censorship*. Oxford University Press, 2018.

The premise under which the eSafety Commissioner operates is fundamentally flawed, being based on a highly subjective consideration of 'harm'. Where there is a legitimate, rather than a political claim that can be made by an end user, the issue is always privacy. This may include intimate images (an existing scheme) but also cases of doxing and the publication of information. Importantly, this is about **information about a person**, not the (often political) **analysis** of this information by a commentator. It is the latter which is where the Commissioner attracts justifiable criticism and controversy.[2]

The question that should be asked is whether the information disclosed is an unjustified interference with one's privacy? Intimate images shared without consent plainly would be. Identifying the fact that someone has physically undergone sex-reassignment surgery would also be a breach of privacy, provided that person had kept that fact confidential. The same would go for the wide circulation of phone numbers, or home addresses, or indeed medical information.

Naturally, the level of sensitivity could vary based on the vulnerability of the person in question. A young child is in a very different position to an older public figure and would have a lower threshold. But none of this departs from an objective assessment of the facts: the problem with the Commissioner's approach is it is entirely subjective and emphasises 'harm'. It does not focus on the content of speech, or the viewpoints expressed. It is therefore something that can be determined based on legal principles, rather than moral standards. It is the introduction of moral standards which brings the law into disrepute.

We note Toby Dagg's recent attendance in Parliament, where he claimed to be issuing informal notices to avoid 'going through the process of crafting and then issuing a formal notice'.[3] The truth is that it requires the same thinking to make a decision, if it is to be done properly. The result is that the Commissioner is not making proper or appropriate decisions, which when challenged, are roundly defeated.[4] Another advantage is it addressed the Commissioner's mistaken focus on URLs, rather than the information itself.[5]

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[2] For example, the question in Billboard Chris's case would be whether the published images in the Daily Mail article would be a breach of privacy, rather than his commentary on them. The same goes for Celine Baumgarten's case, which concerns the commentary on publicly available material published by a School Teacher. The way to avoid these problems is to determine if the material – or information – should be in the public domain. If that was the test, then the eSafety Commissioner would not have made the error of banning the posts in question, and the backlash.

[3] This was on the 30th of May 2024. The transcript is available here: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F28097%2F0003;query=Id%3A%22committees%2Festimate%2F28097%2F0001%22

[4] See *eSafety Commissioner v X Corp* [2024] FCA 499 at [32] where the Judge suggested that calling any evidence from the staff member who made the decision would be 'courageous'.

[5] We have no idea why in the 'Bishop Stabbing' case, the Commissioner said it must be removed from given URLs. The law is clear – it is about the 'material'. Using the word 'information' as privacy law does would also be advantageous.

The present problem is that Australia has weak privacy laws. The focus on eSafety focusses on the wrong issue. The issue is the sharing of inappropriate information, and the lack of privacy, which is incidentally also a problem from the perspective of free speech. That is the solution. We also observe that the Commissioner has breached these laws, even in their present weak form. This includes by making unlawful requests for identity documents, and the absence of any appropriate data governance approach. We separately note that we were sent Teddy Cook's personal details, along with someone the Commissioner (very wrongly, but quite insistently) asserts engaged in 'adult cyber abuse' of Teddy Cook.

2. The need for complaints from the Complainant

We are aware that there is a proposal to remove the requirement that the person subject to the material asks for it to be taken down. We strongly oppose this. Accountability is important. The Commissioner's time – and thus public money – will be wasted on complaints from busybodies. This means that the Commissioner will be unable to focus on more pressing complaints. The risk of removing the requirement to complain will also end up with material being removed, with the person depicted in it being wrongly accused of having complained. It is also inconsistent with the expectation of individual autonomy expressed in the GDPR, which in practice should be followed over and above Australian Law – otherwise technology companies will be forced to choose which jurisdictions laws to comply with.[6]

Furthermore, we are concerned that the existence of a 'complaint' is seen as a burden to the Commissioner. There can be negative consequences for a 'victim' (or someone who files a complaint naively), such as a Striesand effect. The Commissioner frequently treats the consent as a formality, or goes beyond the material complained about. All of this can cause problems for the person depicted in the material. The cases of Billboard Chris and Celine Baumgarten are both illustrations of this phenomenon when the Commissioner overreaches. Whilst those cases are prominent, we can imagine this issue occurring in other cases as well, i.e. *within* communities or even small groups of people.[7]

3. Violent and Adult Content

We also have substantial concerns that this scheme has been abused. The 'Wakeley Bishop Stabbing' case is a stark example of this, where there was an attempt to ban the video worldwide in a manner than brought Australia into disrepute. Asides from illegal content, the sole consideration of the legislation should be ensuring that those who are of a certain age can have effective parental restrictions in place.

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[6] It is unlikely that they would choose Australian provisions over those of the European Union, given the difference in population is considerably over an order of magnitude.

[7] For example, suppose a post involving a child gets taken down. The children involved in making the original post then accuse (rightly or wrongly) the child of having made a complaint to eSafety. The child gets bullied more as a result. It is not difficult to foresee something like this happening, with the approach that eSafety presently take.

Today this does not require any form of verification or censorship by service providers. It is possible now to do this 'on device', with the recent introduction of 'neural processing units', which means images can be automatically checked in real time. These tools can also block access to social media services or limit them as needed. We would therefore suggest that the focus be on the providers of operating systems to ensure these tools are effective for those parents who wish to turn them on.[8]

We object to any online age verification system at the provider level for a simple reason: it requires everyone to identify themselves online. This is a serious intrusion of privacy and also increases the risk of identity theft. It also risks removing any regulation at all, as providers relocate. These types of views have already been well expressed by organisations such as the Electronic Frontier Foundation.[9]

Finally, there are laws that deal with obscene and other unlawful communications, including offence provisions.[10] We see no reason to add to them. By contrast, as people can have more control over what they see online, these are superfluous if they do not invade the privacy of another (e.g. if they are merely violent content).

4. Least Restrictive Approach

Each 'takedown' notice is often a considerable limitation on the implied freedom of political communication, and more generally – asides with indecent images made without consent - freedom of expression. We note that eSafety erroneously focus on taking down the entire post, rather than the content that is a problem. To give an example, the 'Wakeley Stabbing Video' did not need to be taken down in entirety. There is a panoply of different techniques that could be used, ranging from cutting the length of the video, blurring certain parts of it, or removing part of the soundtrack.[11] The focus should be strictly on the offending *material*. A careful focus on the offending material avoids overly aggressive take-down orders. Where there is political content, it is also consistent with what Section 233 of the existing Online Safety Act requires, which the eSafety Commissioner seems to continually overlook.

There are other techniques that might be proportionate. Temporary shadow bans might be proportionate, provided that when the content is corrected, the usual access is restored, along with any loss of views. In certain cases, it would be perfectly reasonable for a 24-hour or 48-hour shadow ban to be imposed whilst a matter can be brought before a specialist Tribunal and to

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[8] For an illustration of this, see https://www.thegospelcoalition.org/blogs/justin-taylor/the-most-effective-technology-on-the-planet-to-block-pornography/. We note that this system has widely worked in Israel. There is no reason why it would not work in Australia too.

[9] See e.g. https://www.eff.org/deeplinks/2023/05/kids-online-safety-act-still-huge-danger-our-rights-online

[10] Many examples are in Section 474 of the *Criminal Code Act 1995* (Cth).

[11] At one point in the Federal Court proceedings, eSafety said that it was the 'screaming' that gave the video a particular quality. In which case the video could simply be muted.

allow time for the person who submitted the content to be able to explain their position. If virality is genuinely the concern, then this can be done without the extreme step of taking down the content entirely.

5. Focussing on the Providers via Process Obligations

The way to manage social media providers is by ensuring they have proper processes in place, so reports can be dealt with under due alacrity. The extra layer of administrative action that the Commisioner takes means that there will always be a consdierable extra delay in approaching that office (see **Figure 1**). In that respect, an effective and direct approach to the provider should be preferred. The focus should be on ensuring there are proper processes and tools at the provider, especially for larger social media companies.[12]

To give an example, it is unclear why if a particular image was identified as being an intimate posted unlawfully that there would not be a tool that quickly identified all instances of that image and removed it, as well as alerting the platform as to any accounts who are posting it. That is withing today's expertise. Similarly, there should be monioring of complaints, to ensure that (1) they are processed in a timely manner and (2) a proper consideration is given. We consider that the latter applies both ways: in other words, these platforms should be penalised if they undermine freedom of expression, or are discriminating in respect of end users. Given the critical nature of these platforms to small businesses, it is important that they should have redress if any of these accounts are taken down or obstructed. The same goes for poltical entities. We therefore consider that decisions from providers should be (1) notifiable and (2) be appealable to all parties.

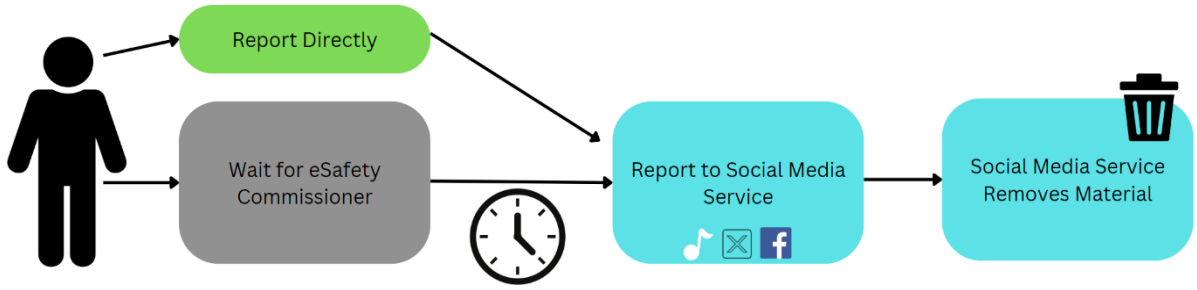

FIGURE 1 – Illustration of the difference between the two processes. The person who writes to the Commissioner is simply delaying the matter, whilst they consider it.

6. The Present Commisisoner has little or no respect for the rule of law in a democratic society.

[12] It is important that new entrants are not subject to onerous burdens. We would therefore expect that only platforms of the scale of 'X' and 'Facebook' should he covered.

We have serious concerns about the Commissioner having powers to permanently take down content. At the most, it should be the ability to take down content or shadow-ban it for a short period whilst the matter is put before an independent tribunal. The conduct of the Commissioner's office is most worrying, and evinces a disrespect for the rule of law in a democratic society. We may give some examples of her office's conduct:

1. **Avoiding appeal rights.** When 'a decision to issue a notice' is made under any of the schemes, any person who posted the content is entitled to be notified.[13] It does not matter if the Commissioner regards her notice to be 'informal'. This includes any reposts that amplify the content in any other way, e.g. a 'quote tweet' or 'retweet' on Twitter.[14] We understand that the Commissioner has not taken any effective action herself to notify people of their appeal rights. This causes us serious concern.
2. **Claiming she does not have to be correct about the criteria.** This argument was advanced in the Federal Court and is most worrying. The claim was in effect if the commissioner subjectively and wrongly felt something was within a category of prohibited material, then they were entitled to remove it. They might as well have been arguing they do not have to apply the law. We are concerned that decision making is also not being made on the objective basis that it is supposed to be.
3. **Ignoring the Implied Freedom of Political Communication.** We are not aware of any notice where this provision has been applied, even though it is the starting point. Furthermore, the legislative extracts they prepare always seem to exclude it. We think that it is being overlooked in decision making at the eSafety Commissioner's office. To avoid this in future, either the Act should be abolished (and replaced with the privacy framing we outlined above), or there be a very strong provision within this scheme that ensures that political matters are not removed from social media.
4. **Failing to follow the Privacy Act 1988.** The Commissioner does not even meet this modest standard. We note serious concerns we had to send in respect of improperly trying to obtain personal information in response to Freedom of Information Act 1982 (Cth) requests we supported people in making.[15] Furthermore, the conduct in respect of complainants is most worrying – not only were we improperly sent 'victims' personal information, but the Commissioner takes no effective steps to advise complaints of the consequences of taking down material (including a possible Striessand effect).

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[13] See Section 27A of the Administrative Appeals Tribunal Act (1975). The same will still apply under the new regime: see Section 265 of the Administrative Review Tribunal Act (2024).

[14] In cases of cyber-bullying, intimate images, or cyber abuse, any notice can be appealed if the content removed 'was **posted** on the service by an end-user of the service--the end-user' (Section 220(b) of the Act). Material is posted where an 'end-user causes the material to be accessible to, or **delivered to**, one or more other end-users using the service.' Whilst a person who re-tweets or reposts is not automatically increasing the accessibility of the material, they are certainly causing it to be delivered to more people who would not otherwise see it. The same point arguably applies for 'liking' posts. On that basis, all these people have a right to appeal, and should generally be notified where possible to do so. The lack of notification is a serious error of law.

[15] https://endesafety.au/foireply12june.pdf

What is most worrying is that she then uses her own legal failures as a basis for demanding exceptional powers, such as trying to undermine the use of VPN's around the world. Her conduct is an illustration that no one office should be dealing with these types of complaints. The power of any Commisisoner should only to be to take temporary action for a few days before a matter is reviewed by an independent Tribunal. The Judicial model is used in New Zealand without difficulty and it should be adopted in Australia.[16]

Given the types of issues with the eSafety Commissioner, we contend that her office should be abolished and the remaining relevant functions transferred to the Privacy Commissioner. We also observe that many of the issues raised by the Act could be dealt with by direct applications of complainants to a fair Tribunal (e.g. if they were subjected to defamation or doxxing) so that they can claim damages. There is no need for a Commissioner to be in the middle of most of this.

We expect that the Commissioner will be demanding more powers. The present issue is the failure of her office to understand her powers, as well as the wider irresponsibility of her Office. She needs to be abolished, with the genuine functions subsumed into the role of the Privacy Commissioner.

Yours sincerely,

Free Speech Union of Australia

[16] See the *Harmful Digital Communications Act 2015* (NZ). That Act also has provisions ensuring someone with appropriate technological qualifications assists in deciding cases where a takedown notice is proposed, which would have avoided the embarrassment of some of the claims the eSafety Commissioner makes in the Federal Court.